Supreme Court, U.S.
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No. 06-18

In The

Supreme Court of the United States

RENTAL SYSTEMS, INC.,

Petitioner,

v.

ROBERT M. TYSON, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals For The First District Of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the arbitrators exceed their authority under the Federal Arbitration Act by deciding the arbitration on a theory that was not pled, argued, briefed or asserted in any manner?

2. Was the arbitration award secured by undue means under the Federal Arbitration Act when Mr. Tyson spoliated critical evidence that was discovered only after the arbitration?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 14.1, the following list identifies all of the parties appearing here and in the court below.

The Petitioner here and in the Supreme Court of Texas is Rental Systems, Inc. Pursuant to Rule 29.6, Petitioner Rental Systems, Inc. hereby states that it is a wholly-owned subsidiary of Dealer Computer Services, Inc. No publicly held company owns 10% or more of the stock of Rental Systems, Inc.

The Respondents here and in the Supreme Court of Texas are Robert M. Tyson and Dana Tyson.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
CITATIONS OF REPORTS OF OPINIONS ENTERED IN THE CASE	1
BASIS FOR SUPREME COURT JURISDICTION	1
STATUTORY PROVISIONS INVOLVED IN THE CASE	1
STATEMENT OF FACTS	2
Material Facts for Consideration	4
ARGUMENT	7
A. The arbitrators "exceeded their powers" by deciding the arbitration on a theory that was not plead, argued, briefed or asserted in any manner.	7
1. Mutual mistake was not argued, plead, briefed or asserted in the underlying arbitration	8
2. It is well-settled that arbitrators' authority is limited by the scope of the parties' pleadings	8
B. The arbitration award was secured by undue means and consequently should have been vacated because Mr. Tyson spoliated evidence that was critical to the case	11

TABLE OF AUTHORITIES

Page

CASES

Butterkrust Bakeries v. Bakery, Confectionery and Tobacco Workers Int'l Union, AFL-CIO, Local No. 361, 726 F.2d 698 (11th Cir. 1984) 9

Courier-Citizen Co. v. Boston Electrotypers Union No. 11, 702 F.2d 273 (1st Cir. 1983) 10

Davis v. Prudential Securities, Inc., 59 F.3d 1186 (11th Cir. 1995) 8, 9

Gateway Coal Co. v. United Mine Workers of America, 414 U.S. 368 (1974) 10

Hoffman v. Cargill, Inc., 968 F. Supp. 465 (N.D. Iowa 1997) 16

Int'l Chem. Workers Union, Local No. 566 v. Mobay Chemical Corp., 755 F.2d 1107 (4th Cir. 1985) 10

JBC of Wyoming Corp. v. City of Cheyenne, 843 P.2d 1190 (Wyo. 1992) 9, 11

John Morrell & Co. v. Local Union No. 304A of the United Food and Commercial Workers, AFL-CIO, 913 F.2d 544 (8th Cir. 1990) 8, 9, 10

Kahara Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274 (5th Cir. 2004) 11

Lynch v. Three Ponds Co., 656 P.2d 51 (Colo. App. 1982) 9

Matter of Arbitration Between Trans Chemical Ltd. and China National Machinery Import and Export Corp., 978 F. Supp. 266 (S.D. Tex. 1997) 12

TABLE OF AUTHORITIES – Continued

Page

Piggly Wiggly Operators' Warehouse, Inc. v. Piggly Wiggly Operators' Warehouse Indep. Truck Drivers Union Local No. I, 611 F.2d 580 (5th Cir. 1980) 9

Rintin Corp., S.A. v. Domar, Ltd., 374 F. Supp. 2d 1165 (S.D. Fla. 2005) 16

Spiska Engineering, Inc. v. SPM Thermo-Shield, Inc., 2004 WL 744233 (S.D. 2004) 13, 14

Sunshine Mining Co. v. United Steelworkers, 823 F.2d 1289 (9th Cir. 1987) 10

Synergy Gas Co. v. Sasso, 853 F.2d 59 (2d Cir. 1988), *cert. denied*, 488 U.S. 994 (1988) 10

Totem Marine Tug & Barge, Inc. v. North American Towing, Inc., 607 F.2d 649 (5th Cir. 1979) 10, 11

United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960) 11

Wren v. Sletten Constr. Co., 654 F.2d 529 (9th Cir. 1981) 10

FEDERAL STATUTES

9 U.S.C. § 10 ..... 2, 7, 11

9 U.S.C. § 11 9

28 U.S.C. § 1257 1

28 U.S.C. § 2101 1

RULES OF THE SUPREME COURT OF THE UNITED STATES

Rule 13.3 1

Rule 14.1 ii

Rule 29.6 ii

CITATIONS OF REPORTS OF OPINIONS ENTERED IN THE CASE

The opinion of the First Court of Appeals (App. 1) is reported at 2005 WL 2850128.

BASIS FOR SUPREME COURT JURISDICTION

The Supreme Court of Texas denied the petition for review on February 10, 2006. Petitioner Rental Systems, Inc. ("Rental Systems") seeks review of that judgment on a writ of certiorari.

Petitioner timely filed a motion for rehearing on February 24, 2006. On March 31, 2006, the Supreme Court of Texas denied the motion for rehearing. (App. 20). The present petition is timely filed under 28 U.S.C. § 2101(c) and under Rule 13.3 of this Court.

This Court has jurisdiction under 28 U.S.C. § 1257(a) to review on a writ of certiorari the judgment of the highest court of a state.

STATUTORY PROVISIONS INVOLVED IN THE CASE

> In any of the following cases, the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration – (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to

> postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a).

STATEMENT OF FACTS

The dispute in this case, and the issues presented herein, arise out of *three* separate versions of a compensation arrangement between appellee ROBERT M. TYSON and appellant RENTAL SYSTEMS, INC., a new company formed to rent personal computers and provide related services. The first agreement was a December 7, 1990 agreement (1990 Agreement) that consisted of a letter of intent addressed to Mr. Tyson that provided for compensation based on the net book value of the new company in the event that Mr. Tyson died or was fired. Mr. Tyson claimed in the arbitration that he never signed the 1990 Agreement. This refusal was the springboard in the case for his proclamation that he should be compensated in accordance with the terms of the second agreement. A signed copy of the 1990 Agreement was found after the arbitration was concluded.

The second agreement was signed April 15, 1991 (1991 Agreement). The second agreement provided that Mr. Tyson would be compensated by the "gain in value" of the new company rather than net book value. Mr. Tyson

admitted that he signed this agreement and, indeed, claimed that this was the only agreement that he signed.

The third agreement was executed on July 9, 1993 (1993 Agreement). The third agreement provided, like the 1990 Agreement, that Mr. Tyson would be compensated on the basis of the net book value of the company in the event that he died or was fired. While Mr. Tyson's signature appears on the third agreement, Mr. Tyson denied that he signed it. The arbitrators in their written opinion concluded that Mr. Tyson did, in fact, sign the third agreement, but concluded that the third agreement was unenforceable based upon the theory of mutual mistake. The theory of mutual mistake was not pled, briefed, asserted, or argued by any party to the arbitration. The issues presented herein are (1) whether the arbitrators exceeded their authority by deciding the case on a theory that was not pled, briefed, argued, or asserted by any party and (2) whether the arbitration award should have been vacated because Mr. Tyson secured the award by undue means.

The arbitrators exceeded their authority by deciding the case on the theory of mutual mistake – when mutual mistake was not pled, argued, briefed, or asserted in any manner. The Federal Arbitration Act provides that an award shall be vacated if the arbitrators exceed their powers. The arbitrators' authority was limited by the scope of the parties' pleadings. In this case, Rental Systems was denied due process when the arbitrators went outside of the pleadings to find a means of deciding the arbitration in Mr. Tyson's favor.

The arbitration award was secured by undue means because Mr. Tyson spoliated critical evidence. The Federal

Arbitration Act provides that an award may be vacated if it is obtained by undue means. Mr. Tyson infected the arbitration with fraud when he spoliated the executed copy of the 1990 Agreement instead of producing it as requested. Mr. Tyson's repeated denials during the arbitration that he ever signed the 1990 Agreement are false. Now that the 1990 Agreement has been found with the authentic signature of Mr. Tyson, he can no longer make the claim that he would only agree to a compensation arrangement based upon the fair market value of the company. Mr. Tyson's refusal to produce the executed 1990 Agreement constitutes fraud that allowed Mr. Tyson to secure the award by undue means.

Material Facts for Consideration

In 1990, Mr. Tyson approached Robert Brockman with an idea for establishing a business that rented personal computers, electronic equipment and provided related services. The discussions culminated with a December 7, 1990, letter of intent from Mr. Brockman to Mr. Tyson (the 1990 Agreement). Mr. Tyson was to provide the plan for the business, and Mr. Brockman was to provide the capital and operational expertise. The 1990 Agreement also recited that Mr. Tyson was to receive a compensation incentive in the event that he was terminated, resigned or died based on the value of the company. This agreement was signed by Mr. Tyson, although throughout the underlying proceedings, he denied that he ever signed it. In fact, his claim that he did not sign the 1990 Agreement was the touchstone of his theory of recovery. Appellant RENTAL SYSTEMS, INC. was the computer rental and services business created.

The parties entered into a second agreement on April 15, 1991 (1991 Agreement). The 1991 Agreement provided that, in the event that Mr. Tyson was terminated, resigned or died, he would receive a Business Appreciation Incentive of 20% of the "Gain in Value" of Rental Systems. The term "Gain in Value" was defined as the "Proceeds" of the Company, less capital contributions to the Company and interest on said capital contributions. "Proceeds" included the net sale price of the Company after all expenses of the sale or the "Appraised Value" of the Company as determined by two or more appraisers in accordance with the procedure set forth in Article 4.

Two years later, the parties entered into a third agreement. On July 9, 1993, both parties entered into an Executive Compensation Plan (the 1993 Agreement) which superceded the 1991 Agreement and served as the new contract. The 1993 Agreement provided for payment of a "Compensation Value" to Mr. Tyson in the event of Mr. Tyson's termination, resignation or death. The "Compensation Value" was to be based on the net book value of the Company. Both Mr. Tyson and Mr. Brockman signed the 1993 Agreement, indicating its acceptance by both parties.

On November 4, 1999, Mr. Tyson was fired. In a memorandum dated November 3, 1999, Rental Systems promptly recognized its obligation to Mr. Tyson pursuant to the 1993 Agreement. On May 5, 2000, Mr. Tyson requested payment strictly in accordance with the 1991 Agreement. Mr. Tyson alleged that he did not sign the 1993 Agreement. He alleged that his signature, as found on the 1993 Agreement, was either forged or otherwise obtained by fraud or deceit.

Subsequently, Mr. Tyson filed suit claiming fraud, breach of contract, and fraudulent concealment. Rental Systems filed a motion to compel arbitration under the Federal Arbitration Act, requesting the district court to enforce the arbitration provision contained in Mr. Tyson's employment agreement. The court granted Rental Systems, Inc.'s motion, and an arbitration hearing was held on September 15-18, 2003. The Arbitration Panel held that the 1993 Agreement was unenforceable based on mutual mistake and that the 1991 Agreement controlled the relationship between the parties. (App. 16). Mr. Tyson never plead, argued or briefed the theory of mutual mistake.

In their Final Award, the arbitration panel recognized the falsity of Mr. Tyson's claim that he did not execute the 1993 Agreement. (App. 16-17). Nevertheless, they concluded that the 1991 Agreement controlled the parties' relationship. (App. 17).

After the award was confirmed and Rental Systems filed an appeal, new evidence was discovered: a copy of the 1990 Agreement signed by Mr. Tyson. In the arbitration proceeding, Mr. Tyson had repeatedly denied signing the 1990 Agreement. He also failed to produce a copy of the signed agreement. Mr. Tyson claimed that he did not sign the 1990 Agreement because it provided termination compensation calculated based upon the net book value of the company rather than the appraised market value of the company. However, the newly discovered evidence established that Mr. Tyson agreed to the terms of the 1990 Agreement and signed the 1990 Agreement on December 9, 1990.

Rental Systems appealed Mr. Tyson's award on the basis that the arbitration panel exceeded its authority by deciding the arbitration on a theory that was not plead, argued, briefed, or asserted in any manner. Both the First Court of Appeals and the Supreme Court of Texas refused to consider Rental Systems' request that the court consider the newly discovered evidence.

ARGUMENT

A. The arbitrators "exceeded their powers" by deciding the arbitration on a theory that was not plead, argued, briefed or asserted in any manner.

The Federal Arbitration Act provides that an arbitration award shall be vacated if the arbitrators "exceeded their powers." 9 U.S.C. § 10(a)(4). This Court should grant review because the arbitrators exceeded their powers by deciding the arbitration on a theory that was not plead, argued, briefed or presented in any manner to the arbitration panel. The arbitrators held that the 1991 Agreement controlled the method of Mr. Tyson's compensation because the 1993 Agreement was voided by mutual mistake. However, the arbitrators exceeded their authority by deciding the arbitration on the theory of mutual mistake – since mutual mistake was not plead, argued, briefed or asserted in any manner.

1. Mutual mistake was not argued, plead, briefed or asserted in the underlying arbitration.

In the arbitration, Mr. Tyson never once claimed, plead, briefed, argued, testified, or submitted any authorities that the 1993 Agreement was the result of a mutual mistake. Indeed, he claimed the exact opposite – that he never signed the 1993 Agreement in the first place. No piece of paper submitted to the arbitrators contained any reference to a mutual mistake claim. Mr. Tyson's allegations were fundamentally inconsistent with any claim of mutual mistake, and it is undisputed that he never submitted any such contention to the arbitrators. Mr. Tyson admitted as much in his brief to the court of appeals when he recited that he filed suit "alleging fraud, breach of contract, declaratory judgment, and fraudulent concealment. . . ." Notably absent from that list of claims was any reference to mutual mistake. Instead, Mr. Tyson's pleadings alleged that "Plaintiffs never agreed to the terms of the [1993 Agreement], and any purported signature, if any, of Mr. Tyson's on the [1993 Agreement] was either forged or otherwise procured by fraud or deceit."

2. It is well-settled that arbitrators' authority is limited by the scope of the parties' pleadings.

The arbitrators' authority was limited not only by the scope of the arbitration provision in Mr. Tyson's employment contract, but also by the pleadings he submitted to the arbitrators. It is well-settled that an arbitrator exceeds his authority if he decides an issue that was not submitted to arbitration. *Davis v. Prudential Securities, Inc.*, 59 F.3d 1186, 1194 (11th Cir. 1995); *John Morrell & Co. v. Local Union No. 304A of the United Food and Commercial*

Workers, AFL-CIO, 913 F.2d 544, 561 (8th Cir. 1990); *JBC of Wyoming Corp. v. City of Cheyenne*, 843 P.2d 1190, 1196 (Wyo. 1992) ("Since JBC never submitted a consequential damage claim according to the required process, it seems almost self-evident that the arbitrator could not make an award of consequential damages."); *Lynch v. Three Ponds Co.*, 656 P.2d 51, 53 (Colo. App. 1982) ("If an arbitrator makes an award which is outside the scope of the issues submitted, that portion of the award which goes beyond the matters submitted to it for resolution is void for lack of jurisdiction."); *Piggly Wiggly Operators' Warehouse, Inc. v. Piggly Wiggly Operators' Warehouse Indep. Truck Drivers Union Local No. I*, 611 F.2d 580, 582-585 (5th Cir. 1980).

In *Davis v. Prudential Securities, Inc.*, the Eleventh Circuit held that the district court erred in confirming the arbitrators' decision on attorneys' fees since that issue was not submitted to the arbitrators.

> [T]he FAA allows a court to modify or correct the award where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted. Thus, the law is well-established that an arbitrator can bind the parties only on issues that they have agreed to submit to him.

Davis, 59 F.3d at 1194, *citing* 9 U.S.C. § 11(b); *Butterkrust Bakeries v. Bakery, Confectionery and Tobacco Workers Int'l Union, AFL-CIO, Local No. 361*, 726 F.2d 698, 700 (11th Cir. 1984).

The Eighth Circuit in *John Morrell & Co. v. Local Union No. 304A of the United Food and Commercial Workers, AFL-CIO* also recognized that an arbitrator's

authority is limited by the specific issues submitted to arbitration:

> We reject the argument that the scope of the arbitrator's authority is limited only by the arbitration clause. It is fundamental that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration. Once the parties have gone beyond their promise to arbitrate and have actually submitted an issue to an arbiter, we must look both to their contract and to the submission of the issue to the arbitrator to determine his authority. . . . There are many instances where courts have recognized that the scope of the arbitrator's authority depends, in part, upon how the parties have framed the issue to be arbitrated.

John Morrell & Co., 913 F.2d at 561, *citing Gateway Coal Co. v. United Mine Workers of America*, 414 U.S. 368, 374 (1974); *Synergy Gas Co. v. Sasso*, 853 F.2d 59, 63-64 (2d Cir. 1988), *cert. denied*, 488 U.S. 994 (1988); *Sunshine Mining Co. v. United Steelworkers*, 823 F.2d 1289, 1294 (9th Cir. 1987); *Int'l Chem. Workers Union, Local No. 566 v. Mobay Chemical Corp.*, 755 F.2d 1107, 1110 (4th Cir. 1985); *Courier-Citizen Co. v. Boston Electrotypers Union No. 11*, 702 F.2d 273, 281 (1st Cir. 1983); *Wren v. Sletten Constr. Co.*, 654 F.2d 529, 533 (9th Cir. 1981).

The Fifth Circuit used this same analysis when confronted with a commercial arbitration award granting relief that had never been requested. *Totem Marine Tug & Barge, Inc. v. North American Towing, Inc.*, 607 F.2d 649, 650 (5th Cir. 1979). Despite the existence of a broad form arbitration clause, the court found that by issuing an award that did not conform to the parties' requests, "the

arbitrators ignored the arbitral dispute submitted by the parties and dispensed their 'own brand of industrial justice.'" 607 F.2d at 652, *citing United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597 (1960).

The underlying analysis behind these cases is clear. Arbitration may be more informal than court, but due process demands that the parties to an arbitration must be provided fair notice of the claims that are being brought against them just as they are in court. *See JBC of Wyoming Corp. v. City of Cheyenne*, 843 P.2d at 1197. Mutual mistake, in particular, is an affirmative defense that must be plead and proved.

B. The arbitration award was secured by undue means and consequently should have been vacated because Mr. Tyson spoliated evidence that was critical to the case.

The Federal Arbitration Act provides that an arbitration award may be vacated if the award was obtained by "undue means." 9 U.S.C. § 10(a)(1). Courts apply a three-prong test to determine whether an arbitration was so affected by fraud that the award should not be enforced. *Kahara Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 306 (5th Cir. 2004). First, the movant must establish the fraud by clear and convincing evidence. *Id.* Second, the fraud must not have been discoverable upon the exercise of due diligence before or during the arbitration. *Id.* Third, the party challenging the award must show that the fraud materially related to an issue in the arbitration. *Id.*

Willful destroying or withholding of evidence in an arbitration constitutes fraud sufficient to overturn the award. *Matter of Arbitration Between Trans Chemical Ltd. and China National Machinery Import and Export Corp.*, 978 F. Supp. 266, 304 (S.D. Tex. 1997). The obligation of a party to preserve and produce critical evidence is not undermined by "the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation." *Id.* at 303.

In this case, Mr. Tyson's intentional spoliation of the executed copy of the 1990 Agreement constitutes fraud and undue means sufficient to vacate the arbitration award. Mr. Tyson's fraud is easily established by clear and convincing evidence. In the underlying arbitration proceeding, Mr. Tyson repeatedly denied signing the 1990 Agreement. He also failed to produce a copy of the signed agreement when asked to do so.

On November 16, 2001, Rental Systems propounded its *First Request for Production of Documents to Claimants Robert M. Tyson and Dana Tyson*. Mr. Tyson should have produced his executed 1990 Agreement in order to properly comply with twelve of Rental Systems' Requests for Production. Seven of the Requests for Production specifically reference "letters of intent," and the 1990 Agreement identifies itself, in no uncertain terms, as a "letter of intent."

During the arbitration, Mr. Tyson claimed that he did not sign the 1990 Agreement. He claimed that he did not sign it because it provided termination compensation calculated based upon the net book value of the company rather than the market value.

Mr. Tyson's fraud was not discoverable upon the exercise of due diligence before or during the arbitration. The executed copy of the 1990 Agreement was accidentally discovered by Rental Systems after the arbitration award was confirmed and after Rental Systems had already filed an appeal to the court of appeals. Rental Systems immediately filed a Motion to Amend its Appellate Brief, but the court of appeals did not even rule on the Motion to Amend and refused to consider the newly discovered, spoliated evidence.

It is unquestionable that Mr. Tyson's spoliation of the executed 1990 Agreement materially related to the central issue in the arbitration – which compensation arrangement governed Mr. Tyson's exit from the company. Because Mr. Tyson spoliated the executed 1990 Agreement, he was able to deny, and indeed he did deny, that he would ever agree to a compensation arrangement based on the value of the company. He claimed that his signature on the 1993 Agreement, which also provided for a compensation arrangement based on book value, was obtained by fraud and deceit. The executed 1990 Agreement confirmed that Mr. Tyson indeed agreed to the terms of the 1993 Agreement.

In 2004, the Supreme Court of South Dakota was presented with facts virtually identical to this case wherein improperly withheld evidence was uncovered that was not presented to the arbitration panel or the trial court. *Spiska Engineering, Inc. v. SPM Thermo-Shield, Inc.*, 678 N.W.2d 804 (S.D. 2004). In that case, Spiska sued Thermo-Shield in arbitration for terminating the parties' contract that granted Spiska specific rights, including exclusive distribution rights, in regard to Thermo-Shield products. *Id.* at 804. During the arbitration, Spiska offered

into evidence various documents that indirectly and circumstantially indicated Thermo-Shield's favorable dealings with Spiska's competitors. *Id.* at 808. The arbitration panel found in favor of Thermo-Shield on the basis that there was no proof that Thermo-Shield's dealings with Spiska's competitor materialized into actual agreements. *Id.*

After the confirmation of the award, three documents were discovered relating to Thermo-Shield's dealings with Spiska's competitor. *Id.* Writing for the court, Justice Meierhenry held that the cause must be remanded for consideration based on whether the documents were improperly withheld.

> However, the record has now been supplemented with documents that were not considered by the trial court. Under these circumstances, we remand for the trial court to reconsider its decision of whether the arbitration award was procured by undue means taking into consideration the newly discovered documents. The trial court should determine in light of the new documents whether Thermo-Shield acted in bad faith in withholding the evidence; and if so, whether there is a nexus between the bad faith behavior and the procurement of the arbitration award.

Id. at 809.

As in *Spiska*, the court of appeals had a cogent basis for considering the newly discovered document because it completely restructures the underlying evidence. Both the 1990 Agreement and the 1993 Agreement premised his compensation on the net book value of the company, which Mr. Tyson wished to avoid. Mr. Tyson claimed that he did not sign the 1990 Agreement because of the net book value

provision contained in that document. Mr. Tyson also claimed that his signature on the 1993 Agreement was fraudulently inserted because he would not sign an agreement that contains a net book value provision. According to Mr. Tyson, the fact that he did not sign the 1990 Agreement because it contained the net book value provision proved that he did not sign the 1993 Agreement for the very same reasons. In a nutshell, Mr. Tyson's position is that he never has, and never would have, signed an agreement that contained a termination compensation provision based on net book value.

Now that the 1990 Agreement has been found with the authentic signature of Mr. Tyson, he can no longer make this claim. The signed 1990 Agreement makes clear that: 1) Mr. Tyson was in fact agreeable to using the net book value; and 2) Mr. Tyson in fact signed the 1990 Agreement. This new evidence confirms that Mr. Tyson agreed to the terms of the 1993 Agreement. It follows that Mr. Tyson knew very well that the condition of the 1990 Agreement containing his signature was relevant to the just resolution of this dispute and that Mr. Tyson intentionally spoliated the document for those very same reasons. Mr. Tyson's action constitutes a breach of his duty to preserve and produce the signed 1990 Agreement.

Mr. Tyson was able to disown the contents of the 1990 Agreement that was produced during the arbitration because that document did not contain his signature. If the newly found, signed 1990 Agreement had been made available at the trial/arbitration phase, judgment would have been in Rental Systems' favor. Simply stated, the only reason Mr. Tyson was successful in arbitration was because he intentionally spoliated a critical document.

It is well-settled that arbitration proceedings provide much more limited discovery procedures than is afforded in regular court proceedings. *Rintin Corp., S.A. v. Domar, Ltd.*, 374 F. Supp. 2d 1165, 1170 (S.D. Fla. 2005); *Hoffman v. Cargill, Inc.*, 968 F. Supp. 465 (N.D. Iowa 1997). However, Mr. Tyson's action in spoliating a critical document so infected the arbitration with fraud that he was able to secure an award in his favor. This case affords the Court the opportunity to clarify that the limited discovery provided in arbitration does not foreclose or in any way diminish a party's obligation to preserve and produce critical evidence. Mr. Tyson secured an arbitration award in his favor by undue means. The Court should grant review.

Respectfully submitted,

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Opinion issued October 27, 2005

[SEAL]

In The
Court of Appeals
For The
First District of Texas

NO. 01-03-01335-CV

ROBERT T. BROCKMAN, INDIVIDUALLY, AND RENTAL SYSTEMS, INC., Appellants

V.

ROBERT M. TYSON ET UX DANA TYSON, Appellees

On Appeal from the 152nd District Court
Harris County, Texas
Trial Court Cause No. 2000-64325

MEMORANDUM OPINION

This is an appeal from a final judgment that confirms an arbitration award relating to the enforcement of a severance payment provision. Robert M. Tyson and Dana Tyson, appellees, sued Robert T. Brockman and Rental Systems, Inc., appellants, for fraud, breach of contract, and fraudulent concealment. The case was arbitrated, and the arbitration panel rendered an award for the Tysons. In two points of error, Brockman and Rental Systems contend that (1) the trial court erred in confirming the arbitration award because the arbitration panel committed a gross

mistake by applying the law of novation and mutual mistake and (2) the trial court erred in confirming the award when the arbitration panel abused its discretion and exceeded its authority by ignoring the terms and procedures of the governing contract in determining the remedy. We affirm.

Background

On April 15, 1991, Brockman and Robert and Dana Tyson entered into an agreement that created Rental Systems, Inc. – a business that rented personal computers, electronic equipment, and associated services. Tyson provided the concept for the business, and Brockman provided the capital and commercial expertise.

The 1991 agreement provided that, in the event that Tyson was terminated, resigned, or died, he would receive a Business Appreciation Incentive of 20% of the "Gain in Value" of Rental Systems. Dana Tyson was also a signatory to this agreement. In 1993, Tyson and Brockman purportedly entered into an Executive Compensation Plan that extinguished the old contract and served as the new, controlling contract. The 1993 Plan provided that, in the event that Tyson was terminated, resigned, or died, he would be provided payment of a "Compensation Value" based on the net book value of the company. Dana Tyson was *not* a signatory to the 1993 Plan.

On November 4, 1999, Tyson's employment terminated. Alleging that his signature on the 1993 Plan was forged or otherwise obtained by fraud or deceit, Tyson requested that he be provided for under the 1991 agreement. Rental Systems disagreed, and Tyson filed suit to recover the Tysons' severance payment under the 1991

contract, alleging fraud, breach of contract, and fraudulent concealment. Rental Systems filed a motion to compel arbitration that was granted. During the four-day arbitration proceeding, Brockman testified that the 1993 Plan was created because the 1991 contract was lost. The Tysons, however, testified that the 1991 contract was not lost, and they produced a copy of the contract during the proceeding.

The Arbitration Panel held that the 1993 Plan was unenforceable and that the 1991 agreement controlled.[1] The arbitration award provided as follows:

> We, the undersigned having been designated in accordance with the arbitration agreement of the parties reflected in Section 9 of the Employment Agreement dated January 7, 1997, having been duly sworn, and having heard all of the proofs, allegations, arguments, and authorities of the parties in a hearing on the merits conducted in Houston, Texas, on September 15, 16, 17, and 18, 2003, hereby unanimously AWARD as follows:
>
> 1. This is a net Award that takes into account all claims, defenses, and matters in dispute in this proceeding as reflected in (1) Claimants' First Amended Specification of Arbitration Claims dated August 15, 2003, and (2) Respondents' Original Answer dated January 29, 2001, filed in this case and brought forward from the state District Court proceeding. The parties have jointly requested a reasoned Award.

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[1] The arbitration proceeding was *not* transcribed by a court reporter.

2. A central issue in this case is whether the termination of Bobby Tyson's employment with RentSys as of November 4, 1999, is governed by an Agreement dated April 15, 1991, and signed by Robert Brockman in his capacity as President of RentSys, Bobby Tyson, and Dana Tyson ("the 1991 Contract"); or, instead, whether such termination is governed by a Rental Systems, Inc. Executive Compensation Plan dated July 9, 1993, and signed by Robert Brockman in his capacity as President of RentSys and Bobby Tyson, but not Dana Tyson ("the 1993 Contract"). Claimants contend that the 1991 Contract controls since the 1993 Contract should be legally unenforceable on various grounds. Respondents, on the other hand, contend that the 1993 Contract was a novation which replaced and superseded the 1991 Contract, and therefore, that the 1993 provisions should control.

3. The Arbitrators agree with the Claimants that the 1993 Contract is unenforceable, and therefore, that the 1991 Contract is to be given force and effect in this case. Robert Brockman's testimony explaining the reason for the creation of the 1993 Contract was that the parties had "jointly declared the [1991 Contract] to be lost." A conflict of testimony exists on this disputed fact. Mr. Tyson testified that the 1991 Contract was not lost, and Dana Tyson's testimony and the actual production of the original 1991 Contract at the arbitration hearing demonstrated that the 1991 Contract was not, in fact, lost as erroneously presumed. Thus, although Bobby Tyson signed the 1993 Contract, the

parties *de facto*, if not *de jure*, essentially had operated as though a mutual mistake of material fact occurred which was tantamount to a failure of formation or consideration. Pursuant to the doctrine of mutual mistake, when parties to an agreement have contracted under a misconception or ignorance of a material fact, the agreement will be voided. Moreover, neither Bobby Tyson nor Robert Brockman intended for the 1993 Contract to be a material modification of the 1991 Contract. As Robert Brockman explained, the 1993 Contract was only intended to duplicate or reconstruct the 1991 Contract. It did not. Such intention was frustrated further by the absence of Dana Tyson as a contracting party in 1993, and by the 1993 Contract's definition of proceeds, in the event of termination, as the net book value of RentSys. It is to be noted that Texas is a community property state and because the parties elected to have Dana Tyson's joinder in the 1991 Contract they should have obtained her consent to or wavier of the 1993 Contract, which was not obtained. We believe this fact is also important. A mutual mistake of fact, defeating contract formation or consideration, also occurs when both parties to a transaction have a common intention, but the written contract does not reflect, or erroneously reflects that intention because of a mistake in documentation of the contract. See *Marcuz v. Marcuz*, 857 S.W.2d 623, 627 (Tex. App. – Houston [1st Dist.] 1993, no writ). Thus, the 1991 Contract's original concept of a Business Appreciation Incentive based upon the Appraised

Value of RentSys should, in equity and good conscience, prevail in this proceeding.

4. The Arbitrators find that the Appraised Value of RentSys, as of November 4, 1999, within the meaning of Article 1 of the 1991 Contract, is $5,900,000.00. The Gain in Value, as of such date, is $5,496,006.00.

5. RentSys is liable to Claimants for a total Award of $1,813,565.36, consisting of (a) the principal sum of $208,260.00 representing the undisputed amount due to Bobby Tyson for bonus compensation for 1999; (b) the principal sum of $1,099,201.20 representing 20% of the aforementioned Gain in Value; (c) pre-Award interest in the sum of $281,104.16; and (d) reasonable attorneys' fees of $225,000.00. Robert Brockman, Individually, has no personal liability for the Awards prescribed by this numbered paragraph 5.

6. The administrative fees and expenses of the American Arbitration Association and the compensation and expenses of the Arbitrators shall be borne by the party(ies) having heretofore incurred the same.

7. The parties are directed to pay and perform all aspects of this Award no later than sixty (60) calendar days from the date this Award is signed, in which case, no post-Award interest shall accrue; however, in the event that the Award is not fully complied with as provided, then post-Award interest shall accrue on all sums awarded herein from and after the sixty-first (61st) day following the date this award is signed, at the rate of 5% per annum.

8. The Award is in full settlement of all claims submitted to this arbitration, and any and all other relief not explicitly awarded herein is hereby DENIED.

The Tysons filed a motion to confirm the award, and Rental Systems filed a motion to vacate the award. After an unrecorded hearing, the trial court confirmed the arbitration award that totaled $1,813,565.36, and Rental Systems appeals the award.

Arbitration

In two points of error, Rental Systems contends that (1) the trial court erred in confirming the arbitration award "when the Arbitration Panel committed such gross mistake in wholly failing to apply Texas law regarding novation and mutual mistake" and (2) the trial court erred in confirming the award "when the Arbitration Panel abused its discretion and exceeded its authority by ignoring the terms and procedures of the governing contract in determining the remedy."[2]

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[2] In their reply brief, Brockman and Rental Systems added a third issue for consideration: whether this Court should consider new evidence consisting of a signed 1990 Agreement that Tyson should have produced during discovery but did not. They argue that Tyson "spoliated" the 1990 Agreement in an attempt to conceal an agreed-to compensation plan that was similar to that found in the 1993 Plan.

An appellant is required to present all issues to be considered on appeal in appellant's brief. TEX. R. APP. P. 38.1, 38.3. New issues presented in a reply brief will not be considered by the appeals court. *Barrios v. State*, 27 SW.3d 313, 322 (Tex. App. Houston [1st Dist.] 2000, pet. ref'd). Furthermore, because the 1990 Agreement was attached as an appendix to the reply brief and is not part of the appellate record in this case, we may not consider it. *See Wright v. Sage*

(Continued on following page)

Standard of Review

There is no dispute among the parties that they entered into a valid, binding arbitration agreement. Texas law favors arbitration. *Brazoria County v. Knutson,* 176 S.W.2d 740, 743 (Tex. 1943). Statutory arbitration is cumulative of the common law: *J.J. Gregory Gourmet Servs. v. Antone's Import Co.*, 927 S.W.2d 31, 33 (Tex. App. – Houston [1st Dist.] 1995, no writ). Our review of an arbitration award is extremely narrow. *IPCO-G.&C. Joint Venture v. A.B. Chance Co.*, 65 S.W.3d 252, 255 (Tex. App. – Houston [1st Dist.] 2001, pet. denied). Common law allows a trial court to set aside an arbitration award "only if the decision is tainted with fraud, misconduct, or gross mistake as would imply bad faith and failure to exercise honest judgment" *Teleometrics Int'l, Inc. v. Hall,* 922 S.W.2d 189, 193 (Tex. App. – Houston [1st Dist.] 1995, writ denied). Because arbitration is favored as a means of dispute resolution, courts indulge every reasonable presumption in favor of upholding the award. *Id.*; *Wetzel v. Sullivan, King & Sabom, P.C.,* 745 S.W.2d 78, 81 (Tex. App. – Houston [1st Dist.] 1988, no writ).

An arbitration award has the same effect as a judgment of a court of last resort, and a court reviewing the award may not substitute its judgment for the arbitrator's merely because the court would have reached a different decision. *City of Baytown v. C.L. Winter, Inc.*, 886 S.W.2d 515, 518 (Tex. App. – Houston [1st Dist.] 1994, writ denied). Every reasonable presumption must be indulged to uphold the arbitrator's decision, and none is indulged

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Eng'g, Inc., 137 S.W.3d 238, 254 (Tex. App. – Houston [1st Dist.] 2004, pet. denied).

against it. *Id.* A mere mistake of fact or law is insufficient to set aside an arbitration award. *J.J. Gregory Gourmet Servs.*, 927 S.W.2d at 33. In the absence of a statutory or common law ground to vacate or modify an arbitration award, a reviewing court lacks jurisdiction to review other complaints, including the sufficiency of the evidence to support the award. *Id.*

The party attacking the arbitration award must prove that the arbitration panel exceeded its authority. *Prudential Sec. Inc. v. Shoemaker,* 981 S.W.2d 791, 793 (Tex. App. – Houston [1st Dist] 1998, pet. denied). The arbitration panel exceeds its authority by deciding a matter not presented to it. 9 U.S.C. §§ 10(a)(4), 11(b) (2005). The issues before the arbitration panel are framed by the contract between the parties and by the pleadings. *Davis v. Prudential Sec. Inc.*, 59 F.3d 1186, 1193 n.8 (11th Cir. 1995).

An arbitration award can be vacated if: (1) the award was obtained by corruption, fraud, or other undue means; (2) the rights of a party were prejudiced by the evident partiality, corruption, misconduct, or wilful misbehavior of an arbitrator; or (3) the arbitrator exceeded its powers, refused to postpone the hearing after a showing of sufficient cause for the postponement, or refused to hear evidence material to the controversy. TEX. CIV. PRAC. & REM. CODE ANN. § 171.088(a) (Vernon 2005). We apply this standard in reviewing the issues raised by Brockman and Rental Systems on appeal.

Novation and Mutual Mistake

In their first point of error, Brockman and Rental Systems contend that the trial court erred in confirming the

arbitration award "when the Arbitration Panel committed such gross mistake in wholly failing to apply Texas law regarding novation and mutual mistake." They argue that the "the terms contained in the 1993 Agreement are so inconsistent with the terms contained in the 1991 Agreement that the two cannot subsist together." They further contend that "Tyson never raised fact issues establishing mutual mistake."

While Brockman and Rental Systems' arguments may have merit in a sufficiency review, they are inappropriate for the review of an arbitration award. We have no record from the arbitration; therefore, we have no way of knowing whether a fact issue was raised, or, for that matter, whether certain issues were tied by consent. The law is well-settled that we cannot substitute our judgment for the arbitrator's. *See City of Baytown*, 886 S.W.2d at 518. That statement presumes that we have facts before us where we could possible [sic] render a different decision. Here, with no record of the arbitration proceeding, we have no way of deciding the issue differently, and, even if we did have a record, we recognize that every reasonable presumption must be indulged to uphold the arbitrator's decision, and none is indulged against it. *See id.*

Accordingly, we overrule point of error one.

Remedy

In point of error two, Brockman and Rental Systems contend that the trial court erred in confirming the award when the Arbitration Panel abused its discretion and exceeded its authority by ignoring the terms and procedures of the governing contract in determining the remedy. Specifically, they argue that the Arbitration Panel "failed

to follow the detailed procedures necessary to properly calculate Mr. Tyson's award under the 1991 Agreement" and "haphazardly calculated [the] award upon Mr. Tyson."

Again, these are improper arguments to raise on the appeal of an arbitration award. As we have previously held, a mere mistake of fact or law is insufficient to set aside an arbitration award. *See J.J. Gregory Gourmet Servs.*, 927 S.W.2d at 33. So, just as with point of error one, we have an inadequate record to determine whether the Arbitration Panel ignored the terms and procedures of the governing contract, but, even if we did have a record from the arbitration, we would be unable to correct any errors in law or fact. *See id.*

Accordingly, we overrule point of error two.

Conclusion

We affirm the judgment of the trial court.

George C. Hanks, Jr.
Justice

Panel consists of Justices Taft, Keyes, and Hanks.

[SEAL]

Court of Appeals
First District of Texas

JUDGMENT

ROBERT T. BROCKMAN, INDIVIDUALLY, AND RENTAL SYSTEMS, INC., APPELLANTS NO. 01-03-01335-CV ROBERT M. TYSON ET UX DANA TYSON, APPELLEES.	V.	Appeal from the 152nd District Court of Harris County, Texas. (Tr. Ct. No. 2000-64325.) Panel consists of Justices Taft, Keyes, and Hanks. Opinion delivered by Justice Hanks.

The cause heard today by the Court is an appeal from the judgment signed by the court below on November 17, 2003. After submitting the cause and inspecting the record of the court below, it is the opinion of this Court that there was no reversible error in the judgment. It is, therefore, **CONSIDERED**, **ADJUDGED**, and **ORDERED** that the judgment of the court below be **affirmed**.

It is further **ORDERED** that the appellants, ROBERT T. BROCKMAN, INDIVIDUALLY, AND RENTAL SYSTEMS, INC., jointly and severally pay all costs incurred by reason of this appeal.

It is further **ORDERED** that this decision be certified below for observance. Judgment rendered by panel consisting of Justices Taft, Keyes, and Hanks. Judgment rendered October 27, 2005.

No. 2000-64325

ROBERT M. TYSON and DANA TYSON,	§	**IN THE DISTRICT COURT**
Plaintiffs,	§	
V.	§	**OF HARRIS COUNTY, TEXAS**
ROBERT T. BROCKMAN, INDIVIDUALLY, AND RENTAL SYSTEMS, INC.	§	
Defendants.	§	**152nd JUDICIAL DISTRICT**

JUDGMENT

(Filed Nov. 5, 2003)

Robert M. Tyson and Dana Tyson, Plaintiffs in this case, filed a motion for an order of this Court to confirm an award made by arbitrators on October 10, 2003, pursuant to an agreement of arbitration between Robert M. Tyson and Defendant Rental Systems, Inc. Said motion was granted. Plaintiffs also sought for this Court to render judgment on the award of the arbitrators.

Pursuant to the Final Award of Arbitrators rendered on October 10, 2003, Plaintiffs Robert M. Tyson and Dana Tyson are entitled to a judgment for the recovery of $1,813,565.36 from Defendant Rental Systems, Inc.

IT IS THEREFORE ORDERED by the Court that Plaintiffs Robert M. Tyson and Dana Tyson have and recover from Defendant Rental Systems, Inc. the sum of $1,813,565.36.

IT IS FURTHER ORDERED by the Court that in the event of an appeal by Rental Systems, Inc. to the Court of Appeals, if the appeal is unsuccessful, Robert M. Tyson

and Dana Tyson will be further entitled to $65,000 as reasonable attorneys' fees; in the event of an appeal by Rental Systems, Inc. to the Supreme Court of Texas, if the appeal is unsuccessful, Robert M. Tyson and Dana Tyson will be entitled to an additional $45,000 recovery for attorneys' fees from Rental Systems, Inc.

IT IS FURTHER ORDERED that the total amount of the judgment here rendered shall bear interest at the rate of 5% per annum from December 10, 2003, until paid.

All costs of court spent or incurred in this cause are adjudged against Rental Systems, Inc., Defendant.

All writs and processes for the enforcement and collection of this Judgment or for the costs of court may issue as necessary. [All relief not granted herein is denied. /s/ kw]

SIGNED on this ___ day of Nov 17 2003, 2003.

/s/ Ken Wise
JUDGE PRESIDING

AMERICAN ARBITRATION ASSOCIATION

Commercial Arbitration Tribunal

AAA Case No. 70 Y 117 00330 01
Administrator: Renee Mobley

In the Matter of the Arbitration Between:

ROBERT M. TYSON ("Bobby Tyson") *et ux* DANA TYSON ("Dana Tyson"), Claimants,

vs.

ROBERT T. BROCKMAN, Individually ("Robert Brockman") and RENTAL SYSTEMS, INC., ("RentSys"), Respondents.

Before Arbitrators Susan G. Perin, Alvin L. Zimmerman, and D. Brent Wells (Chair) in Houston, Texas

FINAL AWARD OF ARBITRATORS

WE, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the arbitration agreement of the parties reflected in Section 9 of the Employment Agreement dated January 7, 1997, having been duly sworn, and having heard all of the proofs, allegations, arguments, and authorities of the parties in a hearing on the merits conducted in Houston, Texas, on September 15, 16, 17, and 18, 2003, hereby unanimously AWARD as follows:

1. This is a net Award that takes into account all claims, defenses, and matters in dispute in this proceeding as reflected in (1) Claimants' First

Amended Specification of Arbitration Claims dated August 15, 2003, and (2) Respondents' Original Answer dated January 29, 2001, filed in this case and brought forward from the state District Court proceeding. The parties have jointly requested a reasoned Award.

2. A central issue in this case is whether the termination of Bobby Tyson's employment with RentSys as of November 4, 1999, is governed by an Agreement dated April 15, 1991, and signed by Robert Brockman in his capacity as President of RentSys, Bobby Tyson, and Dana Tyson ("the 1991 Contract"); or, instead, whether such termination is governed by a Rental Systems, Inc. Executive Compensation Plan dated July 9, 1993, and signed by Robert Brockman in his capacity as President of RentSys and Bobby Tyson, but not Dana Tyson ("the 1993 Contract"). Claimants contend that the 1991 Contract controls since the 1993 Contract should be legally unenforceable on various grounds. Respondents, on the other hand, contend that the 1993 Contract was a novation which replaced and superseded the 1991 Contract, and therefore, that the 1993 provisions should control.

3. The Arbitrators agree with Claimants that the 1993 Contract is unenforceable, and therefore, that the 1991 Contract is to be given force and effect in this case. Robert Brockman's testimony explaining the reason for the creation of the 1993 Contract was that the parties had "jointly declared the [1991 Contract] to be lost." A conflict of testimony exists on this disputed fact. Mr. Tyson testified that the 1991 Contract was not lost, and Dana Tyson's testimony and the actual production of the original 1991 Contract at the arbitration hearing demonstrated that the 1991

Contract was not, in fact, lost as erroneously presumed. Thus, although Bobby Tyson signed the 1993 Contract, the parties *de facto*, if not *de jure*, essentially had operated as though a mutual mistake of material fact occurred which was tantamount to a failure of formation or consideration. Pursuant to the doctrine of mutual mistake, when parties to an agreement have contracted under a misconception or ignorance of a material fact, the agreement will be voided. Moreover, neither Bobby Tyson nor Robert Brockman intended for the 1993 Contract to be a material modification of the 1991 Contract. As Robert Brockman explained, the 1993 Contract was only intended to duplicate or reconstruct the 1991 Contract. It did not. Such intention was frustrated further by the absence of Dana Tyson as a contracting party in 1993, and by the 1993 Contract's definition of proceeds, in the event of termination, as the net book value of RentSys. It is to be noted that Texas is a community property state and because the parties elected to have Dana Tyson's joinder in the 1991 Contract they should have obtained her consent to or waiver of the 1993 Contract, which was not obtained. We believe this fact is also important. A mutual mistake of fact, defeating contract formation or consideration, also occurs when both parties to a transaction have a common intention, but the written contract does not reflect, or erroneously reflects that intention because of a mistake in documentation of the contract. *See Marcuz v. Marcuz,* 857 S.W.2d 623, 627 (Tex. App. – Houston [1st Dist.] 1993, no writ). Thus, the 1991 Contract's original concept of a Business Appreciation Incentive based upon the Appraised Value of RentSys should, in equity and good conscience, prevail in this proceeding.

4. The Arbitrators find that the Appraised Value of RentSys, as of November 4, 1999, within the meaning of Article 1 of the 1991 Contract, is $5,900,000.00. The Gain in Value, as of such date, is $5,496,006.00.

5. RentSys is liable to Claimants for a total Award of $1,813,565.36, consisting of (a) the principal sum of $208,260.00 representing the undisputed amount due to Bobby Tyson for bonus compensation for 1999; (b) the principal sum of $1,099,201.20 representing 20% of the aforementioned Gain in Value; (c) pre-Award interest in the sum of $281,104.16; and (d) reasonable attorneys' fees of $225,000.00. Robert Brockman, Individually, has no personal liability for the Awards prescribed by this numbered paragraph 5.

6. The administrative fees and expenses of the American Arbitration Association and the compensation and expenses of the Arbitrators shall be borne by the party(ies) having heretofore incurred the same.

7. The parties are directed to pay and perform all aspects of this Award no later than sixty (60) calendar days from the date this Award is signed, in which case, no post-Award interest shall accrue; however, in the event that the Award is not fully complied with as provided, then post-Award interest shall accrue on all sums awarded herein from and after the sixty-first (61st) day following the date this Award is signed, at the rate of 5% per annum.

8. This Award is in full settlement of all claims submitted to this arbitration, and any and all other relief not explicitly awarded herein is hereby DENIED.

SIGNED this the 10th day of October, 2003.

/s/ Susan G. Perin
SUSAN G. PERIN

/s/ A L Z
ALVIN L. ZIMMERMAN

/s/ D. Brent Wells
D. BRENT WELLS, Chair

[SEAL] OFFICIAL NOTICE FROM
SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711-2248

RE: Case No. 05-1104 DATE: 3/31/2006
COA #: 01-03-01335-CV TC#: 2000-64325
STYLE: ROBERT T. BROCKMAN, INDIVIDUALLY AND RENTAL SYSTEMS, INC. v. ROBERT M. TYSON ET UX. DANA TYSON

Today the Supreme Court of Texas denied the motion for rehearing of the above-referenced petition for review.

MAIL TO:

MR. JOHN C. ALLEN
LAW OFFICES OF JOHN C ALLEN
909 FANNIN SUITE 1225
HOUSTON TX 77010